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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10 KAREN B. WEISS,

11
12 Plaintiff,

13 v.

14 MICHAEL J. ASTRUE, Commissioner of
15 Social Security Administration,

16 Defendant.

Civil 12cv0719-CAB (WMc)
No.

**ORDER: (1) ADOPTING REPORT
AND RECOMMENDATION [Doc.
No. 21]; (2) DENYING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT [Doc. No. 17];
GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT [Doc. No. 20]**

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18 Pending before the Court is the Report and Recommendation (R&R) of Magistrate
19 Judge William McCurine, Jr., filed on November 7, 2012, recommending that the court
20 grant Defendant Michael Astrue's motion for summary judgment and deny Plaintiff
21 Karen Weiss' motion for summary judgment. [Doc. No. 21.] On November 21, 2012,
22 Plaintiff filed objections to the R&R. [Doc. No. 22.] Defendant did not file a reply.
23 Having considered the parties' arguments and for the reasons stated herein, the Court
24 finds the Magistrate Judge conducted a well-reasoned and thorough analysis, and
25 **ADOPTS** the R&R.

26 I. BACKGROUND

27 Plaintiff was born on November 11, 1962 and has past relevant work as a general
28 duty nurse, a private nurse, and an office nurse. On November 25, 2008, she filed an

1 application for disability benefits, alleging disability beginning June 3, 2003. Plaintiff
2 alleges she has debilitating back pain, stomach problems, diabetes, and emotional issues.

3 On June 23, 2010, Administrative Law Judge (ALJ) Joseph D. Schloss held a
4 hearing to consider Plaintiff's application for disability benefits. The ALJ considered
5 Plaintiff's medical records, Plaintiff's testimony, and testimony of Arthur Lorber, M.D.,
6 and impartial medical expert, and Sandra M. Fioretti, an impartial vocational expert. On
7 August 17, 2010, the ALJ issued a decision, finding that Plaintiff was not disabled under
8 the Social Security Act. On January 25, 2012, the ALJ's decision became the
9 Commissioner's final decision when the Appeals Council denied Plaintiff's request for
10 review. On March 26, 2012, Plaintiff filed a complaint for judicial review in this Court.
11 On July 26, 2012, Defendant filed an answer to the complaint and the Administrative
12 Record (TR). [Doc. Nos. 12, 13.] On August 30, 2012, Plaintiff filed a motion for
13 summary judgment. [Doc. No. 17.] On October 5, 2012, Defendant filed a cross-motion
14 for summary judgment. [Doc. No. 20.] On November 7, 2012, Magistrate Judge
15 McCurine issued the present R&R, recommending that Defendant's motion be granted
16 and Plaintiff's motion be denied.

17 II. LEGAL STANDARDS

18 The Social Security Act entitles a claimant to disability benefits if he is unable to
19 "engage in any substantial gainful activity by reason of any medically determinable
20 physical or mental impairment which can be expected to result in death or which has
21 lasted or can be expected to last for a continuous period of not less than 12 months." 42
22 U.S.C. §§ 416(i), 423(d)(1)(A). To qualify for benefits, the impairment must result from
23 "anatomical, physiological, or psychological abnormalities which are demonstrable by
24 medically acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. §
25 423(d)(3); *Gallant v. Heckler*, 753 F.2d 1450, 1452 (9th Cir. 1984). Further, the
26 impairment must be of "such severity that he is not only unable to do his previous work
27 but cannot, considering his age, education, and work experience, engage in any other
28 kind of substantial gainful work which exists in the national economy." 42 U.S.C. §

1 423(d)(2)(A).

2 An individual may seek judicial review of the Commissioner of Social Security's
3 final agency decision. 42 U.S.C. §§ 405(g), 1383(c)(3). However, the scope of review is
4 limited. A court may not overturn the Commissioner's final action unless (1) the ALJ's
5 findings of fact are not supported by substantial evidence, or (2) the ALJ failed to apply
6 the proper legal standards. *See Flaten v. Secretary of Health and Human Svcs.*, 44 F.3d
7 1453, 1457 (9th Cir. 1995).

8 "Substantial evidence" means evidence a reasonable person might accept as
9 adequate to support the ALJ's conclusion, considering the record as a whole. *See*
10 *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Thomas v. Barnhart*, 278 F.3d 947,
11 954 (9th Cir. 2002). The Court must consider both the evidence that supports and
12 detracts from the Commissioner's conclusions. *See Mayes v. Massanari*, 276 F.3d 453,
13 459 (9th Cir. 2001); *Desrosiers v. Sec'y of Health and Human Servs.*, 846 F.2d 573, 576
14 (9th Cir. 1988).

15 Even if substantial evidence supports the ALJ's findings, a court must set the
16 decision aside if the ALJ failed to apply the proper legal standards in weighing the
17 evidence and reaching a decision. *See Benitez v. Califano*, 573 F.2d 653, 655 (9th Cir.
18 1978). But if the evidence supports more than one rational interpretation, the court must
19 uphold the ALJ's decision. *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1989).

20 Federal Rule of Civil Procedure 72(b) and 28 U.S.C. § 636(b)(1) set forth the
21 duties of the district court in connection with a Magistrate Judge's report and
22 recommendation. The district court "must make a de novo determination of those
23 portions of the report . . . to which objection is made," and "may accept, reject, or
24 modify, in whole or in part, the findings or recommendations made by the magistrate."
25 28 U.S.C. § 636(b)(1)(c); *see also United States v. Remsing*, 874 F.2d 614, 617 (9th Cir.
26 1989).

27 III. ANALYSIS

28 Plaintiff objects on two grounds to the Magistrate Judge's recommendation to

1 grant Defendant's motion and deny Plaintiff's motion. Plaintiff argues that the ALJ
2 failed to articulate specific and legitimate reasons for rejecting the opinions of Dr.
3 Jackson and Dr. Grossman.

4 1. Dr. Jackson.

5 Plaintiff argues that the ALJ failed to heed the opinions of Dr. Jackson and failed
6 to articulate any reasons for doing so. [Doc. No. 22 at 4.] In her objections, Plaintiff
7 admits that while the ALJ had no obligation to translate the word "prolonged" into the
8 language of Social Security, the ALJ is not free to ignore such opinions either. [Doc. No.
9 22 at 3.] However, as noted by the Magistrate Judge, the ALJ did not completely reject
10 Dr. Jackson's opinions. Rather, he afforded some weight to the opinion, even though
11 Dr. Jackson's opinion was rendered in the workers' compensation context, which does
12 not define disability in the same manner as Social Security. [Doc. No. 21 at 9.]

13 Moreover, the ALJ did articulate the reasons why he was giving greater weight to
14 Dr. Lorber's opinion: "The time restraints and the limitations pertaining to the lower
15 extremities described by Dr. Lorber are appropriate given the claimant's radiculopathy,
16 her weight, and her symptoms associated with the diabetes mellitus." [TR at 30.]
17 "Whether substantial evidence supports a finding is *determined from the record as a*
18 *whole*, with the court weighing both the evidence that supports and the evidence that
19 detracts from the ALJ's conclusion." *Mayes v. Massanari*, 276 F.3d 453, 459 (9th Cir.
20 2001)(internal citation omitted)(emphasis added). On review the court must make a
21 determination "from the record as a whole." *Id.* Here, the record shows that the ALJ
22 provided legitimate reasons supported by substantial evidence in the record to afford
23 some weight to the opinion of Dr. Jackson. Therefore, Plaintiff's objection is rejected.

24 2. Dr. Grossman.

25 Plaintiff argues that the ALJ rejected the opinions of Dr. Grossman, an examining
26 physician, in favor of the opinions of the two non-examining physicians, without
27 articulating specific and legitimate reasons. [Doc. No. 22 at 4.] However, as correctly
28 noted by the Magistrate Judge [Doc. No. 21 at 10-11], the ALJ did articulate why he

1 gave limited weight to the report of Dr. Grossman:

2 Dr. Brian Grossman, a qualified medical examiner for workers'
3 compensation purposes, made the following functional capacity assessment:
4 the claimant can lift and carry 20 pounds occasionally and 10 pounds
5 frequently; she can stand and/or walk for less than four hours in an 8-hour
6 workday; she can sit for less than four hours in an 8-hour workday; she can
7 push and pull no more than 20 pounds; she cannot climb; and she can
8 occasionally balance, stoop, kneel, crouch, crawl, and twist (Exhibit 6F, pp.
9 405-406). This capacity **exceeds** those described by the medical expert and
10 the State agent. For reasons discussed above, this capacity is excessive.
11 Therefore, less weight is given the opinion of Dr. Grossman.
12 TR 31.

13 Moreover, the ALJ referred to specific evidence in the record when he explained
14 the weight he gave to the various opinions: "The time restraints and the limitations
15 pertaining to the lower extremities described by Dr. Lorber are appropriate given the
16 claimant's radiculopathy, her weight, and her symptoms associated with the diabetes
17 mellitus." [TR at 30.] Thus, the record shows that he ALJ properly applied less weight
18 to the opinion of Dr. Grossman for specific and legitimate reasons supported by
19 substantial evidence. *Mayer*, 276 F.3d at 459. Therefore, Plaintiff's objection is rejected.

20 IV. CONCLUSION

21 Accordingly, for the aforementioned reasons, **IT IS HEREBY ORDERED** that:

- 22 1. The Magistrate Judge's Report and Recommendation is **ADOPTED**;
- 23 2. Plaintiff's motion for summary judgment is **DENIED**;
- 24 3. Defendant's motion for summary judgment is **GRANTED**;
- 25 4. The Clerk of the Court shall **TERMINATE** this case.

26 DATED: August 19, 2013

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CATHY ANN BENCIVENGO
United States District Judge